

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

James Thomas, :
Plaintiff, : Case No. 2:10-cv-74
v. : JUDGE SMITH
Gary R. Croft, et al., :
Defendants. :

OPINION AND ORDER

On March 8, 2010, the Magistrate Judge issued a Report and Recommendation on plaintiff James Thomas' two motions for preliminary injunctive relief and denied Mr. Thomas' motions for adequate copies of his complaint. Mr. Thomas timely objected to the recommended disposition of his motions for preliminary injunction and to the denial of his motions for copies. The defendants filed responses in opposition to plaintiff's objections, and Mr. Thomas replied. Mr. Thomas also filed a motion for default judgment against the defendants. For the following reasons, the Court will overrule plaintiff's objections and adopt the Report and Recommendation in its entirety. In addition, the Court will deny plaintiff's motions for default judgment and for reconsideration of the order denying his motions for copies.

I. The Report and Recommendation

A. Recommended Disposition of Plaintiff's Motions for Preliminary Injunctions

The Magistrate Judge found Mr. Thomas' first motion for preliminary injunction was too vague to allow the Court to grant any relief. In that motion, Mr. Thomas stated only that on some unspecified date, some of the defendants - none of whom were specifically named in the motion - assaulted Mr. Thomas in some way. The motion did not allege that this is an ongoing situation

and was not supported by any evidence. Under those circumstances, the Magistrate Judge determined there was no basis to conclude that Mr. Thomas would be irreparably harmed if this motion were not granted.

The Magistrate Judge found that Mr. Thomas' second motion, while more specific, dealt with only one incident, the alleged serving of a pork sausage on January 30, 2010, and that this allegation also was not supported by an affidavit or other evidence. Even assuming that this event happened just as Mr. Thomas described it, the primary purpose of an injunction is to prevent the occurrence of some harm in the future, or to stop a course of ongoing unlawful conduct. See, e.g., United States v. Fang, 937 F.Supp. 1186, 1198 (D. Md. 1996) ("Injunctive relief by its very nature is prospective; it looks not to correct past wrongs but to prohibit future wrongs"). Because there was no evidence that the defendants in this case engaged in an ongoing pattern of retaliatory and unlawful conduct, the Magistrate Judge concluded that the Court could not issue an injunction on the basis of a single alleged incident like the one described in the motion.

B. Mr. Thomas' Objections

In his objection, Mr. Thomas denies that his first motion was vague and claims that he named in his complaint the specific individuals responsible for assaulting him. He also argues that he should not have to take chances that the assaults will be repeated or that further retaliatory actions will occur. Moreover, in his view, the four factors to be considered in deciding a motion for preliminary injunction weigh in his favor. Mr. Thomas asserts that he is likely to succeed on the merits, that the public interest favors the protection of his constitutional rights, that he will suffer irreparable injury if the injunction is not granted, and that no substantial harm to others will occur if the motion is granted because the requested injunction will require only that the defendants abide by the

applicable laws, regulations, and policies for protecting inmates which they must do in any event.

Mr. Thomas also challenges the Magistrate Judge's finding that his second request for injunctive relief is based on a single incident where the defendants served him a pork sausage in violation of his religious tenets. He states that pork was served again for dinner on February 12, 2010, and for lunch/brunch on either March 6, 2010, or March 7, 2010.

C. Standard of Review

When objections are received to a report and recommendation on a dispositive matter, the district judge "must determine de novo any part of the magistrate judge's disposition which has been properly objected to." Fed. R. Civ. P. 72(b)(3). After review, the District Judge "may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate judge with instructions." Id.; see also 28 U.S.C. §636(b)(1).

D. Analysis

That Mr. Thomas may have identified the parties responsible for the alleged assault in his forty-page complaint does not mean that his first motion for injunctive relief was not vague. The fact remains that the motion itself lacks even the most basic details of the purported incident and is not supported by any evidence. In his two-page motion, Mr. Thomas invokes his rights under the First, Fourth, Eighth, and Fourteenth Amendments to the United States Constitution, states that he is a member of a protected class, and lists the addresses for himself and the defendants. He then accuses the defendants in conclusory fashion of having conspired to assault him and having failed to abide by ODRC policies and the Ohio Administrative Code. The motion does not even describe the injunctive relief Mr. Thomas is seeking, but simply states that he needs the preliminary injunction and/or protective order against the defendants.

Injunctive relief by its very nature is prospective. Mr.

Thomas argues that he should not have to risk being assaulted again, but there is nothing in the motion, or even the complaint, which permits the Court to gauge the likelihood of any future assaults or other retaliatory actions against him. In the absence of any evidence that such events are likely to occur, the issuance of a preliminary injunction is not appropriate based on the factors the Court is required to consider. See Washington v. Reno, 35 F.3d 1093, 1099 (6th Cir. 1994).

Not surprisingly, Mr. Thomas would weigh these factors differently. There is no indication, however, that the Magistrate Judge improperly applied the standards for granting or denying a motion for preliminary injunction. See Victoria's Secret Stores v. Artco Equip. Co., 194 F.Supp.2d 704, 716 (S.D. Ohio 2002) (reviewing Magistrate Judge's application of standards for setting aside entry of default). Rather, the Report and Recommendation recites and weighs the proper standards. Nothing in the record suggests this Court should reach a different conclusion with respect to Mr. Thomas' first motion for preliminary injunction. Accordingly, his objections will be overruled.

In regard to his second motion, the fact that Mr. Thomas may have been served pork on one or two other occasions hardly establishes that the defendants are engaged in a pattern of retaliatory and unlawful conduct. Absent any evidence supporting the existence of such a pattern, the issuance of a preliminary injunction would not be appropriate. Mr. Thomas' objection to the recommended disposition of his second request for injunctive relief will therefore be overruled.

II. Motions for Adequate Copies

Mr. Thomas first filed a "Motion for Adequate Copies" requesting the Court to provide him at government expense with sufficient copies of the complaint for himself, for the Court, and for the defendants. He later filed a second motion asking for a photocopy of his own complaint. The Magistrate Judge

denied the motions on the grounds that the in forma pauperis statute, 28 U.S.C. §1915, does not entitle Mr. Thomas to free copies. See Anderson v. Gillis, 236 Fed. Appx. 738, 739 (3d Cir. 2007) (citing Douglas v. Green, 327 F.2d 661 (6th Cir. 1964)).

In his motion for reconsideration, Mr. Thomas states that his requests for free copies are not based on his status as a pauper, but on his rights under the Fourteenth Amendment to due process and the equal protection of the laws. He further states that not only does he not have the money or earning capacity to pay for the copies, but that he would risk his physical safety by sending any statement of claims out for copying given that the defendants are located either at the prison or at the Ohio Department of Rehabilitation and Correction. According to Mr. Thomas, these facts grant this Court the authority to order or direct adequate photocopies.

A. Standard of Review

In reviewing a Magistrate Judge's ruling on a nondispositive matter, the District Judge "must consider timely objections and modify or set aside any part of the order that is clearly erroneous or contrary to law." Fed.R.Civ.P. 72(a); see also 28 U.S.C. §636(b)(1)(A). Under the "clearly erroneous" standard, the District Judge must affirm the Magistrate Judge's order unless it has a definite and firm conviction that a mistake has occurred. In re Search Warrants Issued Aug. 29, 1994, 889 F.Supp. 296, 298 (S.D. Ohio 1995). A District Judge's review under the "contrary to law" standard is plenary, and the court may set aside any legal conclusions that "contradict or ignore applicable precepts of law, as found in the Constitution, statutes, or case precedent." Gandee v. Glaser, 785 F.Supp. 684, 686 (S.D. Ohio 1992).

B. Discussion

Under the Fourteenth Amendment, a state may not "deprive any person of life, liberty, property without due process of law; nor deny to any person within its jurisdiction the equal protection

of the laws." U.S. Const. amend. XIV, §1. It should be noted that Mr. Thomas' motions for adequate copies were not directed at the defendants. Rather, he asked the Court to provide him with copies of his statement of claims against the defendants with the cost to be borne by the United States. This Court is subject to the Fifth Amendment Due Process Clause which has been held to contain an equal protection component substantially similar to that of the Equal Protection Clause of the Fourteenth Amendment. In light of Mr. Thomas' status as a pro se litigant and the similarity of the protections afforded by the Fifth and Fourteenth Amendments, the Court will consider his due process and equal protection arguments.

Although Mr. Thomas does not identify the precise nature of the due process and equal protection violations arising from the Court's refusal to provide him with photocopies, his argument appears to encompass his fundamental right of access to the courts. See Bounds v. Smith, 430 U.S. 817 (1977). Among the constitutional bases for the right of access to courts are the Fifth Amendment Due Process Clause and the Fourteenth Amendment Equal Protection Clause. See Christopher v. Harbury, 536 U.S. 403, 415 n.12 (2002) (internal citations omitted).

A prisoner's access to the courts must be adequate, effective and meaningful. Yarborough v. Garrett, 579 F.Supp. 2d 856, 869 (E.D. Mich. 2008) (citing Bounds). There is no constitutional requirement, however, that a prisoner be provided with free copies. See Fazzini v. Gluch, 875 F.2d 863 (table), 1989 WL 54125 at *2 (6th Cir. May 23, 1989) (access to law library or assistance of legally trained personnel all that is required); Dugar v. Coughlin, 613 F.Supp. 849, 854 (S.D.N.Y. 1985) (right of access to courts not unconstitutionally infringed by reasonable charges for copying). Assuming that such a right exists, the prisoner would need to show that he was prejudiced by the denial of free copies in order to state a claim for denial of meaningful access to the courts. See Pilgrim v. Littlefield, 92 F.3d 413,

416 (6th Cir. 1996).

Mr. Thomas presumably requested copies of his complaint for the Court and the defendants in order to effect service of process. The United States Marshal, however, sent a copy of the complaint and summons to each defendant by certified mail. An executed return of summons was filed for all defendants except for defendant Collins, who at the time of attempted service was no longer employed by ODRC. The original complaint was filed with the Court on January 29, 2010. The Clerk mailed copies of both the complaint and the order granting Mr. Thomas IFP status to the Office of the Ohio Attorney General on the same day. Under these circumstances, Mr. Thomas has not explained why he still needs a time-stamped copy of the complaint. He simply has not shown that the denial of his motion for adequate copies hindered his ability to proceed with this case. Moreover, the fact that Mr. Thomas apparently has no other need at this time for copies of the complaint renders his concerns for his personal safety moot since he will not have to turn over his statement of claims to any of the defendants for photocopying.

For the reasons stated above, the Court determines that the order denying Mr. Thomas' motions for copies of the complaint is neither clearly erroneous nor contrary to law. The motion for reconsideration of that order will therefore be denied.

III. Motion for Default Judgment

On March 26, 2010, Mr. Thomas filed a motion for default judgment for the monetary relief sought in his complaint, as well as for relief against the defendants in their official capacity. Mr. Thomas states that more than forty-five days have passed since the defendants were served with a copy of the complaint and summons. Mr. Thomas did not show by affidavit the failure of the defendants to plead or otherwise defend during this time frame and did not request the clerk to enter default. See Fed.R.Civ.P. 55(a). The docket itself, however, reflects that defendants Croft, Free, Knab, Good, Smith, and Shoemaker have not answered

the complaint or filed a motion pursuant to Fed.R.Civ.P. 12. These defendants instead filed a "Waiver of Reply and Reservation of Affirmative Defenses" on March 4, 2010, in which they also ask the Court to screen the complaint pursuant to 28 U.S.C. §1915A(b) and 28 U.S.C. §1915(e)(2), as amended by the Prison Litigation Reform Act.

The defendants' waiver of reply is based on a provision of the PLRA codified at 42 U.S.C. §1997e(g). This provision allows a defendant in a prisoner suit not to answer the complaint unless ordered by the court to do so. The court may require any defendant to reply to such action if it finds that the plaintiff has a reasonable chance of prevailing on the merits. A waiver of reply does not constitute an admission to the allegations set forth in the complaint, and no relief may be granted to the plaintiff unless the defendant has filed a reply.

It is the practice of this Court to screen all prisoner civil rights actions as soon as the complaint is docketed. If the complaint appears to be frivolous, fails to state a claim upon which relief can be granted, or seeks monetary relief against a defendant who is immune to such relief, the Magistrate Judge recommends that the action be dismissed sua sponte pursuant to 28 U.S.C. §1915A(b). Absent such a recommendation, the Court issues an order directing the plaintiff or the United States Marshal to serve each named defendant with summons and a copy of the complaint, and setting a date for the defendants to answer.

In this case, the Court issued an order granting Mr. Thomas' application to prosecute this action without prepayment of costs and ordering the Marshal to serve a copy of the complaint and summons on each defendant. Summons were issued at that time for defendants Collins, Croft, Free, Good, Knab, Shoemaker, and Smith. All named defendants at that time, except for defendant Collins, received summons and their copies of the complaint on February 5, 2010. Ernie Moore was added as a defendant in an amended complaint and served on March 16, 2010. He filed his own

Waiver of Reply and Reservation of Affirmative Defenses on April 6, 2010.

The docket does not reflect that defendant Collins was ever served. A party has no duty to plead or otherwise defend until he is properly served. See Fisher v. Lynch, 531 F.Supp.2d 1253, 1269 n.12 (D. Kan. 2008). Defendant Collins is, therefore, not in default. See Fed.R.Civ.P. 55(a). Because defendant Moore is not required to serve his answer to the amended complaint until April 30, 2010, he also would not be in default at this time even had he not already filed his waiver of reply. With respect to the remaining defendants, Mr. Thomas' motion for default judgment must be denied because he did not first seek an entry of default from the Clerk of this Court. See Heard v. Caruso, 351 Fed.Appx. 1, 15-16 (6th Cir. 2009). For all of the above reasons, Mr. Thomas' motion for default judgment will be denied. However, because the Court did screen the complaint and order service to be made, those defendants shall answer or otherwise assert their defenses within fourteen days.

IV. Disposition

Based on the foregoing reasons, the Court overrules Mr. Thomas' objections (#23) and adopts the Report and Recommendation (#21) in its entirety. The motions for preliminary injunction (#2 and #12) are denied. The Court also denies Mr. Thomas' motions for reconsideration (#24) and for default judgment (#29). The defendants who have appeared in this action shall answer or otherwise respond to the complaint within fourteen days of the date of this Opinion and Order.

/s/ George C. Smith
George C. Smith
United States District Judge

